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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 35

LLOYD BARENBLATT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

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INDEX

	Page
Interest of American Association of University Professors	1
Statement of Case	3
Question Discussed by Amicus, and Summary of Argument	5
Argument	
1. Since the First Amendment protects academic freedom against Congressional abridgement, Congressional investigations of universities and faculty members must be carefully circumscribed	8
2. This investigation, and the questions petitioner was directed to answer, unjustifiably infringed his freedom as a member of the academic community and thereby invaded the autonomy which is necessary to colleges and universities	13
a. The nature and necessity of academic autonomy	13
b. The harmful effects of this and similar investigations on academic autonomy	16
c. Justification for this investigation was lacking	23
3. Congress should not be taken to have authorized the House Committee on Un-American Activities to investigate education and to compel petitioner to answer the questions he refused to answer. If such authorization was attempted, it must fall as violative of the First Amendment	28
Conclusion	29

CITATIONS

Cases: Page

American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950) 24
Barenblatt v. *United States*, 240 F. 2d 875 (D.C. Cir. 1957) 3, 5, 25
Barenblatt v. *United States*, 252 F. 2d 129 (D.C. Cir. 1958) 5
De Jonge v. *Oregon*, 299 U.S. 353 (1937) 24
First Unitarian Church v. *County of Los Angeles*, 357 U.S. 545 (1958) 12
Herndon v. *Lowry*, 301 U.S. 242 (1937) 24
Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 (1951) 10
Kutcher v. *Housing Authority*, 20 N.J. 181, 119 A. 2d 1 (1955) 10
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958) 6, 7, 9, 18
Perkins v. *Lukens Steel Co.*, 310 U.S. 113 (1940) 12
Quintana v. *Holland*, 255 F. 2d 161 (3d Cir. 1958) 13
Rudder v. *United States*, 226 F. 2d 51 (D.C. Cir. 1955) 10
Sacher v. *United States*, 356 U.S. 576, 577 (1958) 9
Slochower v. *Board of Higher Education*, 350 U.S. 551 (1955) 17
Speiser v. *Randall*, 357 U.S. 513 (1958) 12
Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 6, 8, 9, 25
U.S. ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 13
Watkins v. *United States*, 354 U.S. 178 (1957) 5, 9, 19, 24, 28

United States Constitution:

Amendment I 6, 7, 8, 12, 24, 25
Amendment XIV 6

Statutes and Other Congressional Material:

Congressional Record, vol. 100, pp. 11609-615 5
Hearings Before the House Committee on Un-American Activities on Communist Methods of Infiltration (Education), 83d Cong., 1st Sess. (1953) 3, 18
Hearings Before the House Committee on Un-American Activities, 83d Cong., 2d Sess. (1954) 3, 4, 5

Page

Senate Judiciary Committee, Internal Security Subcommittee, Hearings, Subversive Influence in the Educational Process, 83d Cong., 1st Sess. (1953), pp. 605-22 18
52 Stat. 942 (1938), 2 U.S.C. 192 (1952) 5
Veterans' Readjustment Assistance Act, 66 Stat. 667, 38 U.S.C. § 933 (1952) 10

TEXTS AND OTHER REFERENCES:

American Ass'n of University Professors:

"Academic Freedom and Tenure: 1940 Statement of Principles," 44 AAUP Bulletin 290 (1958) ... 27
"Academic Freedom and Tenure in the Quest for National Security," 42 AAUP Bulletin 49 (1956) 21
"The Defense of Academic Freedom and Tenure by College and University Administrations," 42 AAUP Bulletin 94-96 (1956) 18
"The Jefferson Medical College," 42 AAUP Bulletin 75 (1956) 17
"New York City Municipal Colleges," 42 AAUP Bulletin 71 (1956) 17
"1915 Report of the Committee on Academic Freedom and Tenure," 34 AAUP Bulletin 141 (1948) 14
Reports of Dismissals, 42 AAUP Bulletin 61, 77, 79, 81, 87 (1956); 43 id. 177 (1957); 44 id. 11, 22, 53, 102, 137, 151 (1958) 16
"Statement on Procedural Standards in Faculty Dismissal Proceedings," 44 AAUP Bulletin 270 (1958) 27
American Civil Liberties Union, Greater Philadelphia Branch, Academic Freedom: Some Recent Philadelphia Episodes 21 (1954) 17
Barth, The Loyalty of Free Men, ch. ix (1951) 21
Brown, Loyalty and Security 339-49 (1958) 27
Bulletin of the Atomic Scientists, vol. 12, p. 227 (1956) 11
Cahn, "The Firstness of the First Amendment," 65 Yale L.J. 464 (1956) 25
Caughey, In Clear and Present Danger (1958) 15
Comment, "Legislative Inquiry Into Political Activity: First Amendment Immunity from Committee Interrogation," 65 Yale L.J. 1139 (1956) ... 25

Page

Hofstadter and Metzger, Development of Academic Freedom in the United States (1955) 15
Hutchins, "The Meaning and Significance of Academic Freedom," 300 The Annals 72 (1955) 21
Lazarsfeld and Thielens, The Academic Mind: Social Scientists in a Time of Crisis (1958) 18, 21, 23
Lyford, "Social Science Teachers and The 'Difficult Years'," 43 AAUP Bulletin 636 (1957) 21
MacIver, Academic Freedom in Our Time (1955) 13, 21, 27
Mason, The Core of Free Government 1938-40 25
"Mr. Justice Stone and 'Preferred Freedoms'," 65 Yale L.J. 597 (1956) 25
National Academy of Sciences, Report of the Committee on Loyalty in Relation to Government Support of Unclassified Research (1956) 11
N. Y. Times, Aug. 15, 1956, p. 8, col. 3 11
Note, 69 Harv. L. Rev. 551 (1956) 10
Taylor, "The Dismissal of Fifth Amendment Professors," 300 The Annals 79 (1955) 21
Wilcox, "Invasions of the First Amendment through Conditioned Public Spending," 41 Cornell L.Q. 12 (1955) 12

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BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

INTEREST OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors is the largest organization of individuals in the field of higher education in the United States and Canada. It has approximately 40,000 members, 35,000 of whom are active members currently engaged in teaching and

research in nearly 1,100 approved colleges and universities. Since its founding in 1915 the Association has spoken for the academic profession in many matters of educational concern, and has been especially active with respect to academic freedom and tenure, which it deems essential to the educational process. Although the Association has supported freedom and tenure primarily by professional means, it recognizes the role of legal doctrines and actions in relation to education. Hence it desires to present its best thought regarding certain of the issues involved in the present case, for consideration by the Court.

Since 1948 the American Association of University Professors has been deeply concerned with legislative investigations into alleged Communist subversion on college and university campuses in relation both to the investigations themselves and to their effects on student attitudes and the performance and tenure of faculty members. The Association has published reports concerning the dismissal or non-reappointment of 19 members of college and university faculties in the wake of investigations by Congressional or State legislative committees; and additional instances have come to its attention. The Association also regards academic strength and productivity as an element of national security, and is therefore concerned with the effective administration of higher education and with the preservation of legislative powers to foster higher education. It recognizes that the issues presented in the context of the present case are delicate and complex, and it presents this statement with recognition of the competing claims involved.

Petitioner and Respondent have given written consent to the filing of this Brief.

STATEMENT OF CASE

The Association refers the Court to the briefs of the parties for full statements of the case. Here only those aspects essential to an understanding of the argument advanced in this brief are presented in detail.

Petitioner appeared pursuant to subpoena before a subcommittee of the House Committee on Un-American Activities on June 28, 1954. At the opening of that day's hearings Committee counsel, in response to a request by the Chairman to state the purposes "for this hearing this morning," said in part:

> The field covered will be in the main communism in education and the experiences and background in the party of Francis X. Crowley. It will deal with activities in Michigan, Boston, and in some small degree, New York. (Gov't Ex. 8,[1] pp. 5753-4).

Crowley's testimony relating to petitioner included statements that he had known petitioner, in 1950 or

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[1] Hearings Before the House Committee on Un-American Activities on Communist Methods of Infiltration (Education—Part 9), 83d Cong., 2d Sess. (1954). This series of hearings began on Feb. 25, 1953, with a statement by the Chairman describing the purpose of the investigation. This statement (Hearings, Pt. I, 83d Cong., 1st Sess., pp. 1-3, also set forth as an Appendix to the opinion of the Court of Appeals, 240 F. 2d 875, 884-6) concluded as follows:

> The committee is equally concerned with the opportunities that the Communist Party has to wield its influence upon members of the teaching profession and students through Communists who are members of the teaching profession. Therefore, the objective of this investigation is to ascertain the character, extent and objects of Communist Party activities when such activities are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party.

earlier, as a member of the "Haldane Club of the Communist Party" at the University of Michigan, an organization which Crowley described as "chiefly an intellectual group, discussion group." (Gov't Ex. 8, pp. 5773-4, 5778, 5781-2.) He also testified:

> I am convinced that he has left it, the Communist Party.
>
> Mr. Kunzig: Your close knowledge of him was up to about 1950?
>
> Mr. Crowley: Yes, I have seen him a few times since then, occasional visits. (Gov't Ex. 8, p. 5778.)

Petitioner himself testified that he was a graduate student at the University of Michigan during the period 1947-50 and a teaching fellow in psychology during most of that time. (Gov't Ex. 8, pp. 5802, 5813.) From 1950-1954 he was an instructor in psychology at Vassar College. His contract there expired June 15, 1954, after he had been subpoenaed. (Gov't Ex. 8, pp. 5811, 5813.)

He refused to answer the following questions of the Committee:

> Are you now a member of the Communist Party?
>
> Have you ever been a member of the Communist Party?
>
> Now, you have said that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?
>
> Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?
>
> Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?

Petitioner offered to the Committee an elaborate statement setting forth the reasons for his refusal, which did not include any claim of privilege against self-incrimination. (Gov't Ex. 8, pp. 5807-10.) The Committee in due course fully reported these events to the House of Representatives. The House agreed to a resolution that the Speaker certify the Committee's report to the United States Attorney for the District of Columbia. (100 Cong. Rec. 11609-13; Gov't Brief on Petition for Writ of Certiorari, pp. 10-11.)

Petitioner was charged with a violation of 2 U.S.C. sec. 192, in an indictment containing five counts—one for each question he refused to answer. Found guilty by the court on all counts, he appealed to the Court of Appeals for the District of Columbia, which affirmed the judgment of conviction. 240 F. 2d 875. On petition for a writ of certiorari, this Court granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of Appeals "for consideration in light of *Watkins* v. *United States*, 354 U.S. 178." 354 U.S. 930. The Court of Appeals then heard the case *en banc*, and on January 16, 1958 again affirmed the judgment of conviction, four judges dissenting. 252 F. 2d 129. Petitioner's application to this Court for a writ of certiorari was granted April 14, 1958.

QUESTION DISCUSSED BY AMICUS, AND SUMMARY OF ARGUMENT

The American Association of University Professors as *amicus curiae* wishes to direct the Court's attention to the following question presented by the present case:

> Whether compulsion to answer the questions which the petitioner refused to answer, viewed in the

context of the kind of investigation the House Committee on Un-American Activities was conducting, was consistent with due legal protection to academic freedom.

The Association takes no position on other issues that may be raised by the granting of the writ of certiorari. Its concern is limited to legal protection of the vital interest of colleges and universities in academic freedom, as that interest arises in the circumstances of this case. Due protection involves interpretation of the investigating committee's mandate and, in the last analysis, the rights safeguarded by the First Amendment.

This Court has already recognized, notably in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), that legislative investigations may encroach on "freedom of communication of ideas, particularly in the academic community." 354 U.S. at 245. The scope of legislative investigations of the academic community and its members must, it is clear, be carefully circumscribed in order to avoid conflict with the First Amendment or, in the States, with the Fourteenth Amendment. In general such investigations must be pertinent to legitimate legislative purposes. These purposes are limited, as respects the Congress, to matters of Federal concern. Coercive invasion of the privacy and freedom from upheaval that are essential to academic endeavors must also be minimized. Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; 78 S. Ct. 1163 (1958).

The threatened punishment of the petitioner in this case appears as a link in a chain of acts which constitute an unwarranted trespass by the legislature on academic freedom. The American Association of

University Professors does not assert that academic freedom should receive unqualified immunity from compulsory legislative investigations. In this connection as in other a balance must be struck between the legislature's demands and interests needing protection. *N.A.A.C.P.* v. *Alabama, supra.* Nor does the Association's position depend on the individual rights to the First Amendment freedoms which teachers possess in common with other people. Rather it emphasizes the immunity from unwarranted coercion which adheres to a member of the academic community as a representative of that community. That immunity protects the workable autonomy that academic institutions require in order to carry out their educational and research responsibilities.

The record of recent history shows that the questioning of petitioner and other teachers about political beliefs and associations, even when the questioners were concerned only with what they deemed to be dangerous subversion, has had a seriously damaging effect, both directly and through other forces which the investigations have released. The same record shows that conditions in the academic community created little justification for such questioning. The data obtained or obtainable would not have formed the basis for valid legislative action; and the exercise of academic autonomy provided adequate protective measures against abuse of academic freedom.

As a consequence of these arguments, the Association urges that the Court may properly find that Congress did not authorize the Committee on Un-American Activities to make an investigation of education that would include the compulsory disclosures required of petitioner. If the mandate of the Committee is found

to include such an authorization, then the Association argues that the authorization as carried out in this case is an unconstitutional abridgement of rights protected by the First Amendment.

On either ground, the judgment of the court below should be reversed.

ARGUMENT

1. Since the First Amendment Protects Academic Freedom Against Congressional Abridgement, Congressional Investigations of Universities and Faculty Members Must be Carefully Circumscribed.

Opinions of a majority of this Court in the recent case of *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), readily establish this general proposition. The opinion of the Chief Justice, in which Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan joined, said:

> There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community. (354 U.S. at 245.)

The same opinion went on to say:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon

> the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (354 U.S. at 250.)

The opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, concurring in the result, spoke in even more emphatic terms of "the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university." (354 U.S. at 262.)

These statements must, of course, be related to the broad power of Congress to conduct investigations, which this Court has often recognized. Cf. *Sacher* v. *United States*, 356 U.S. 576, 577 (1958). As outlined in *Watkins* v. *United States*, 354 U.S. 178 (1957), that power "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." (354 U.S. at 187.) However, the investigative power, in its coercive aspect, must be carefully circumscribed so far as inquiry into education is concerned, to avoid unwarranted interference with the operation of educational institutions. The rights of privacy of the members of academic communities, which, like the right involved in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958), require protection, are essential to the conduct of academic institutions.

Only the strongest reasons can justify their impairment. The principal reason relied upon in the original and final opinions of the court below in support of the questioning of petitioner was that the investigation was not primarily into education, but one directed at communism, with only incidental impact on education. Even so that impact, if real, must be justified by the end sought to be served and by the need for it in order to serve that end. This central issue will be considered in the next part of this argument. At this point it is desirable to deal with two related issues under the present general heading.

The court below in its original opinion suggested two examples of possible reasons for legitimate Congressional intervention in educational affairs inspired by considerations of internal security. One was a provision of the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 667, 38 U.S.C. § 933, forbidding educational allowances to veterans for any courses in an educational institution while it is "listed by the Attorney General under section 3 of part III of Executive Order 9835, as amended." This reference is to the Attorney General's list of subversive organizations considered by this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Without reviewing the implications of the several opinions in that case, it is enough to say that the propriety of using the Attorney General's list as a legislative standard has been seriously challenged, and is still not authoritatively resolved. See *Rudder* v. *U. S.*, 226 F. 2d 51 (D.C. Cir. 1955); *Kutcher* v. *Housing Authority of the City of Newark*, 20 N.J. 181, 119 A. 2d 1 (1955); Note, 69 Harv. L. Rev. 551 (1956). It does not appear, moreover, that the Act which is cited furnishes any justification for in-

vestigating the affairs of institutions not on the Attorney General's list.

The other example suggested by the court below was the Government's interest in defense and other contracts held by universities. The Association does not question the proper concern of Congress with the honest and efficient spending of public funds; but it earnestly contends that the granting of government funds to universities (or their acceptance) does not open the door to unrestricted questioning of faculty members about their political and academic associations, especially where there is no security problem created by access to classified information. The executive branch of the Government has conceded as much by accepting the well-supported conclusion of a committee of the National Academy of Sciences that loyalty investigations of grantees of federal funds for non-sensitive research should be abandoned.[2]

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[2] Report of the Academy's Committee on Loyalty in Relation to Government Support of Unclassified Research dated March 13, 1956, released April 4, 1956, reprinted in part in 12 Bulletin of the Atomic Scientists 227 (1956). Assistant to the President Sherman Adams advised the National Academy, in a letter released Aug. 14, 1956 (see N. Y. Times, Aug. 15, 1956, p. 8, col. 3), that government agencies would "follow practices consistent with the recommendations" of the report.

Among the memorable observations of the report are the following:

> A fundamental contribution leading ultimately to the cure of cancer, providing it were made generally available, would be no less beneficial to all humanity for having been made by a communist. Authentic scientific progress carries with it no ideological flavor from its source . . . .
>
> "Yet the idea persists that the Government in granting funds for research confers a favor upon scientists as individuals. We consider this contrary to the fact. In appropriating funds for the support of research, we believe the Congress to have been motivated by an urgent national need.

The question of Congressional power to protect federal appropriations is not actually raised by the petitioner's case. Nevertheless, it may be appropriate to pursue this argument a bit further, especially since Federal aid to higher education may become of increasing importance. The Association would be loath to see adopted, as a general guide to action, the idea that the giving of funds bestows a general power of control on the giver. The principle that the one who pays the piper may therefore call the tune has been discredited many times in the history of our educational institutions, and it should not be revived at a moment when the size of governmental payments is growing ever greater. Nothing could be more harmful to the autonomy of the state universities, which are dependent on grants from their legislatures, or to the autonomy of the private institutions, which are indirectly supported by tax exemptions, than the acceptance of this theory of purchase and control.

Furthermore, where rights under the First Amendment are put in jeopardy, the power of government to impose conditions on its spending, see *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940), is subject to significant restrictions. These restrictions are admirably analyzed in Willcox, *Invasions of the First Amendment Through Conditioned Public Spending*, 41 Cornell L.Q. 42 (1955), and need not be further developed here. Nor can a legislature which by statute has conferred rights, privileges, or immunities that could be withdrawn, like those that stem from the maintenance of a state university, impair their enjoyment by methods violative of constitutional or statutory right, *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958); *First Unitarian Church* v.

County of Los Angeles, 357 U.S. 545, 78 S. Ct. 1350 (1958); cf. *Quintana* v. *Holland*, 255 F. 2d 161 (3d Cir. 1958); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

2. This Investigation, and the Questions Petitioner Was Directed To Answer, Unjustifiably Infringed His Freedom as a Member of the Academic Community and Thereby Invaded the Autonomy Which Is Necessary to Colleges and Universities.

a. The Nature and Necessity of Academic Autonomy.

Academic freedom is often defined in terms of

> the right claimed by an accredited educator, as teacher and as investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution. (MacIver, *Academic Freedom in Our Time* (1955), p. 6.)

The Association of course adheres to this as one meaning of academic freedom, and welcomes its recognition by the Court as a right to be protected against governmental infringement. But it does not rest the present argument primarily on the rights of faculty members as individuals nor does it claim any special privileges for teachers as persons, beyond those that arise from their academic responsibilities.

It prefers, instead, to emphasize a second ground, namely, that academic freedom also belongs to a teacher in his representative capacity as a member of the academic community. The threatened punishment of petitioner is a link within a chain of acts which ends in the trespass by the Government on

certain immunities essential to academic institutions. The constitutional issue takes its form from these facts. In the case under review, the real antagonists were the Government and the university; the interrogation of the teacher was a form of governmental attack; the infringement of his freedom impinged upon him as an agent of the university community and thereby injured that community.

One of the essential preconditions of academic freedom—of freedom in teaching and research—is unhampered control by the university over employment and dismissal of its faculty. It is the key to the door that guards the

> intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world. (*1915 Report of the Committee on Academic Freedom and Tenure of the American Association of University Professors*, reprinted in 34 AAUP Bulletin 141 (1948).)

Once this key is surrendered to an external body, be it public or private, the university becomes an adjunct and dependency of that body, and loses its *raison d'etre* as an arbor for the cultivation of new ideas. Once this key is surrendered, academic freedom disappears. Direction of curriculum and instruction, honesty in speech and publication—all that stands in need of academic freedom and justifies it—rest upon the principle of autonomy.

It would not be accurate to say that the universities have always guarded this principle as jealously as they

should. For reasons resting in history, our universities lack that independence of spirit and those organs of faculty control which characterize and give protection to their sister institutions abroad. Our universities are governed by laymen; our administrators, wrestling with budgets, have been known to please and appease prospective donors; our local communities have not refrained from telling the universities what to do. Fortunately, private individuals and groups tend, because of their multiplicity, to neutralize one another, and the university, if it will, can maintain itself amidst conflicting pressures. Though instances of professors fired because of outside private pressure are not unknown in the annals of academic freedom, happily they are rare. A different situation exists, however, when these vulnerable institutions of higher learning face the monopolistic power of the state, and when the state with legal panoply summons professors to speak to charges of disloyalty and subversion. In such cases, the area of maneuverability is constricted, and the pressure upon the institution is often impossible to resist.[3]

[3] The authors of this brief *amicus curiae* are greatly indebted to an analysis of the nature and needs of academic institutions, which was prepared for their use by Professor Walter P. Metzger of the Department of History at Columbia University. The outstanding study, *Development of Academic Freedom in the United States* (1955), of which Professor Richard Hofstadter and he are the authors, contains a wealth of detail with regard to the origins, organization, and pertinent characteristics of American colleges and universities. The members of the Court are referred to this volume for significant data in support of the argument here made. Professor Metzger is currently a member of the 37-member Council of the American Association of University Professors, which has discussed the substance of this brief and has approved it in outline. See also Caughey, *In Clear and Present Danger*, 143-5 (1958), for an analysis of academic freedom and autonomy by a former Vice-President of the Association.

b. The Harmful Effects of This and Similar Investigations on Academic Autonomy.

The activities of the House Committee on Un-American Activities and other state and federal investigating committees with similar aims have frequently precipitated dismissals from college and university faculties, as well as nonrenewal of term appointments that would otherwise have been extended. In most of the cases occurring in the last decade, a refusal to answer questions put by a committee (based either on the privilege against self-incrimination, or, as in the instant case, on other constitutional grounds) has stimulated the administration of an employing institution either to dismiss summarily or to institute proceedings that ultimately led to dismissal.

Nineteen cases from twelve institutions have been the subjects of reports by the Association. Since these reports give a fairly detailed account of each case, and of its relationship to the investigating committee's interrogation, reference is made to them in the footnote.[4] The reports make clear that in some instances

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[4] HCUA—House Committee on Un-American Activities.
ISC—Internal Security Subcommittee of the Senate Judiciary Committee.

Name of Institution	Number of dismissals	Investigating Comm. Involved	Reference to AAUP Bulletin
			vol. page
Dickinson College	1	HCUA	44:137
New York University	1	ISC	44:22
	1	HCUA	
Ohio State University	1	HCUA	42:81
Reed College	1	HCUA	44:102
Rutgers University	2	ISC	
	1	HCUA	42:77
Temple University	1	HCUA	42:79
University of Kansas City	1	ISC	43:177
University of Michigan	2	HCUA	44:53
University of Southern California	1	HCUA	44:151
University of Vermont	1	ISC	44:11
University of Washington	3	State Legislature	42:61
Wayne University	2	HCUA	42:87

the faculty members concerned, as well as the administrations, were not without fault; but the impact of the investigations upon the academic community is not diminished by that fact.

In addition to these cases there were fourteen dismissals from New York City Municipal Colleges (see 42 AAUP Bulletin 71 (1956)), following refusals to testify before Congressional committees, under Section 903 of the New York City Charter, which was held invalid by this Court in *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1955).

In one instance the House Committee on Un-American Activities is said to have injected itself into an investigation of three faculty members of the Jefferson Medical College in Philadelphia that was being made by the administration of the College. The professors, who were at odds with the administration over a demand that they name persons they had known as Communists in their own alleged past associations with the Party, were served with subpoenas from the Committee while in the Dean's office; only one however was actually called to testify. Here is an episode where, it must be said, the College administration apparently showed little regard either for academic autonomy or for academic due process.[5]

A similar instance of committee activities affecting colleges and universities is described in sworn testimony by R. E. Combs, counsel to the California Senate Committee on Un-American Activities. He testified before the Internal Security Subcommittee of the

[5] See American Civil Liberties Union, Greater Philadelphia Branch, *Academic Freedom: Some Recent Philadelphia Episodes* 21 (1954); 42 AAUP Bulletin 75 (1956).

Senate Judiciary Committee[6] that a number of California college and university presidents arranged to obtain "clearance" from the state committee for new appointments to their faculties, and to receive privately "derogatory information" on their existing staffs.

These reported episodes by no means include all the relevant dismissals. Furthermore, they take little account of cases where, following committee activity, a faculty member was induced to resign to avoid either further notoriety or outright dismissal.[7]

However, it should be noted to the credit of the academic community, there have been notable instances reported where university administrations resisted the pressures of investigating committees and other interests that were threatening academic autonomy.[8]

It cannot be successfully argued that the committees are entirely inculpable because they do not fire professors and do not claim the right to do so. It is true that the university authorities make the final decision. But there is here an interplay between governmental and academic action which makes the latter a likely consequence of the former, with public clamor precipitated by the investigation as an additional causal factor.

This Court in *N.A.A.C.P.* v. *Alabama*, 357 U.S.

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[6] Hearings, Subversive Influence in the Educational Process, 83d Cong., 1st Sess. pp. 605-22 (1953).

[7] Lazarsfeld and Thielens, *The Academic Mind: Social Scientists in a Time of Crisis* (publication pending; see p. 21, below), contains in ch. 2 some data on forced resignations and failures to reappoint.

[8] See 42 AAUP Bulletin 94-6 (1956).

449, 463, 78 S. Ct. 1163, 1172 (1958), said of a related situation: "It is not sufficient to answer, as the state does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold." See also the opinion of the Court in *Watkins* v. *United States,* 354 U.S. 178, 197-8 (1957), where, after reviewing the evil effects of "forced revelations . . . of past beliefs, expressions, or associations," the Court said, "that this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."

When coercion begets capitulation, it must take prior blame. This coercion need not be overt or cast in legal form. When a teacher in a college or university is called before a legislative committee investigating subversive activities, and is asked under penalty of contempt to name his political associations, the very raising of the question, the very summons itself, casts a pall of suspicion upon him that makes him less serviceable to his institution. The university, forced to choose between keeping a teacher whose name has been beclouded, and dismissing him in order to preserve its own good name, is burdened with a harsh dilemma and suffers undue constraint. It is sometimes argued that this constraint will be avoided if the faculty member answers all the questions and proves his innocence. This argument is misleading. For one thing, the teacher may thus be forced to choose

between giving up constitutional privileges or giving up his job. For another, vindication may not be easy to achieve. Charges speak louder than denials; discredit attaches to notoriety, however innocently incurred. But these are not the main objections to this line of argument. Coercion is not less real or harmful because it produces ready compliance. It might as well be suggested that the university has nothing to fear as long as its private donors, after questioning members of the faculty, raise no issue with professors who agree with their point of view. The effect of such pressures on objective scholarship is obviously stultifying.

The encroachment on academic autonomy was enlarged in this case by the content of certain of the questions which dealt with the witness's campus activities while he was a graduate student at the University of Michigan. A university, like a spiritual order, must train its own candidates and novitiates to the standards designed for the calling. Were no more than this process interfered with, academic autonomy would be a shadow lacking substance. For, one may ask, what does it profit a university if it control the machinery of dismissal but cannot shape the material for appointment? And, of what use is academic freedom, as a formal guaranty, if those who aspire to teach are conditioned in their schooldays to prefer a posture of safety to the exercise of their freedoms? These questions are not rhetorical, or irrelevant to this case. The extra-curricular is intimately bound with the curricular: to investigate the *academic* associations of a *student* is to place the whole area of instruction, of faculty-student relations, of student rights and discipline, under governmental control.

To ask a student to defend his participation in a campus organization, to subject this association to current standards of judgment rather than to those contemporary with it, to proceed perhaps to ask for the names of his schoolfellows who were his associates, is to subdue by frightening example any tendency toward nonconformity and the expression of thought through action in the student generation of today.

There have been many expressions of concern over the depredations outlined above.[9] A thorough-going and scientific study of the effects on social scientists of all the pressures particularly identified with the years from 1948 to 1955 has recently been completed and is awaiting publication.[10] This study is based on interviews in 1955 with a large sample of 2451 social scientists from 165 four-year liberal arts colleges and universities. It attempted to discover, among other matters, the extent to which the respondents felt that their own professional independence had been impaired or was jeopardized. Analyzing the responses to many questions, the authors suggest that almost half (46 per

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[9] See, *e.g.*, the special committee report, *Academic Freedom and Tenure in the Quest for National Security*, 42 AAUP Bulletin 49 (1956); Barth, *The Loyalty of Free Men* ch. ix (1951); Hutchins, *The Meaning and Significance of Academic Freedom*, 300 The Annals 72 (1955); Taylor, *The Dismissal of Fifth Amendment Professors*, id at 79; MacIver, *Academic Freedom in Our Time* 46-53 (1955).

[10] Lazarsfeld and Thielens, *The Academic Mind: Social Scientists in a Time of Crisis* (1958). Some of the findings presented here in quite condensed form are summarized less tersely by Lyford in *Social Science Teachers and the "Difficult Years,"* 43 AAUP Bulletin 636 (1957). Since the material in this brief is drawn from a manuscript, courteously made available by the authors and the publisher, page references are not given.

cent) of the respondents were significantly apprehensive, in that they were worried about what might happen to them, or had taken precautionary measures to avoid interference with their teaching or their positions. A more precise measure of insecurity is furnished by reports of altered professional behavior—by 12 per cent of the respondents who said that they were "more careful" not to recommend reference material to students that might be criticized as too controversial, and by 9 per cent who said they had actually "toned down" something they had written because it "might cause too much controversy."

A primary source of apprehension was a large number—990—of "incidents" described by the respondents—the word "incident" being used to signify an "episode, long or short, in which an attack, accusation, or criticism is made against a teacher; a group of teachers, or a school as a whole." A majority (54 per cent) of the charges made in these incidents were political (as distinguished from religious, racial, economic and other controversial matters); 29 per cent related directly to charges of communism and subversiveness. It is of interest that of the 269 respondents who had themselves been involved in an "incident" 73 per cent were rated as "apprehensive." The degree of apprehension also rose with the number of incidents in his institution of which a respondent was aware.

As would be expected, the charges of close Communist associations and sympathies appeared to have the most serious consequences, measured by the proportion of reported dismissals or resignations under pressure. And—coming at last to the role of the investigating committees in all this—the committees

initiated "the bulk of the Communist party membership charges" (mostly referring to past membership). "About a quarter of the accusations brought by governmental investigating committees against teachers involved past membership in the Communist Party, subversion, and other extremist political positions, compared to 2 per cent of those made by all other sources." It should be said that while the charges made by the investigating committees were more damaging, they at least tended to be more specific than the often vague charges of communism and subversion that emanated from the local community or from the college community itself. The frequency of charges from these local sources (they amounted to almost half of the charges the sources of which were identified) absolves the investigating committees from a measure of direct responsibility; but there remains (though it cannot be measured) the indirect effect of the profuse publicity which the committees have sought and obtained for their exposures.

A comparable study which would cast light on the effects of the investigations on students, especially those preparing for a career in teaching, does not seem to have been made.[11]

c. Justification for This Investigation Was Lacking.

In view of the harmful effects of congressional investigations of education outlined above, the Association submits that the asserted justification for this investigation is inadequate. In suggesting this

[11] Many of the respondents in the Lazarsfeld-Thielens study shared the widely-held opinion that students are less willing to join unpopular student organizations or to express unpopular views in the classroom than they were in 1948-49.

approach to judgment, it recognizes that the invasions of constitutional privileges in this case are not so direct and punitive as to authorize an almost automatic condemnation. Cf. *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Herndon* v. *Lowry*, 301 U.S. 242 (1937).

The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger set, within which the interest in national self-preservation and in enlightened and well-informed law-making also prominently appear. When two major interests collide, as they do in the present case, neither the one nor the other can claim *a priori* supremacy. But it is in the nature of our system of laws that there must be demonstrable justification for an action by the Government which endangers or denies a freedom guaranteed by the Constitution.

The weight and sources of such justification may of course vary with the setting of the conflict. If, for example, an act of Congress is called into question, the deliberation of the legislators in enacting a statute, and the Congress's own balancing of interests, are given considerable weight. A conspicuous example of this approach is *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). That case involved a statute, enacted pursuant to the extensive power of Congress to regulate commerce.

But the instant case lies in an area where the legislative policy to authorize these inquiries is not embodied in a statute and has been obscurely expressed. *Watkins* v. *United States*, 354 U.S. 178 (1957). A proper deference to the guarantees of the Bill of Rights, particularly those of the First Amendment, should militate here against facile acquiescence

in the Committee's activities. See *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261, 266 (concurring opinion); Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464 (1956); Mason, *The Core of Free Government, 1938-40; Mr. Justice Stone and "Preferred Freedoms"*, 65 Yale L.J. 597 (1956); Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity from Committee Interrogation*, 65 Yale L.J. 1159 (1956).

The main justification for the Committee's questioning of petitioner was its general investigation of the extent of Communist influence. The court below in its first opinion upheld the validity of the investigation, and found that its exercise in the educational field was not exceptionable.

> While it is true, as appellant points out, that Congress has broader powers to enact legislation in the field of labor than it does in the field of education, it is not true that persons who incidentally happen to be teachers have greater immunity from inquiry into their activities than do labor leaders and screen writers, when those activities relate to matters which are a legitimate concern of the Congress. (240 F. 2d 875, 882.)

This brief does not discuss the extent of the Committee's power to investigate Communism or other subversive ideologies outside of higher education. It does take issue with the failure of the court below to recognize that special considerations apply to the attempted extension of such inquiries into the field of education. When subversion is the subject of investigation and a member of an academic community is involved, these investigations almost invariably invade the intellectual life of the institution. The existence

of such an invasion is especially notable, when, as here, the individual's beliefs and campus associations are called in question.

Nor can the doctrine of justified "incidental effects" rely on a contention that the inquiry into subversion touched the faculty member not as teacher or scholar but as citizen. Of course there are situations where such a clear-cut division would obtain—for example, if a teacher were questioned about a criminal offense like murder or arson, or, on the other side, if he were questioned solely about the contents of his lectures. But the situation of the petitioner—and it is common in inquiries of this kind—was one in which the two roles overlapped. He was accused neither of a legal crime nor of dereliction of duty as a teacher; yet his responses to the questions might have led to either charge. Certain questions had to do with his affiliations outside the university; others had to do with his affiliations within. All the questions broached, if only implicitly, the subject of political ideology, which is referable alike to scholarship and to civic action. When the questions show no seam, the witness's roles are indivisible. Unending, unbounded, non-specific, these investigations do not aim at a circumscribed target, which on occasion they may miss, but aim at a very wide field, hoping to hit a mark. The needs of academic freedom require that such broadsides be curtailed.

Finally, there is no showing that the academic community, in the exercise of the autonomy here defended, was incapable of correcting any abuses of academic freedom that may have occurred. The teaching profession has been fully aware of the possibility that a few of its members might misuse their positions to engage either in dishonest indoctrination in the class-

room, distorted research, or illegal extracurricular activities. It has engaged in a lively discussion of the standards of procedure and proof that should govern such cases, especially in the vexed instance of the Communist teacher.[12] This discussion has been cast against a background of recognized institutional and professional responsibility for academic competence and behavior, and of procedures in virtually every college and university for purging academic ranks of those unworthy to remain. Neophytes in the academic profession, like petitioner at the time of his questioning, are under especially close scrutiny. Nationally formulated norms of academic freedom, tenure, and removal procedure, which leading organizations in the field of higher education maintain, are the reflection of practices developed within many institutions.[13]

It is the conclusion of the Association, based on close observation of the academic scene by its various organs, that the House Committee has followed (and indeed, has fostered) a greatly exaggerated impression of the number and influence of Communist teachers. Established instances of misconduct have been few; and the potentialities for improper indoctrination, which seem to cause the most serious concern, have given rise to the most serious misapprehensions. These

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[12] These discussions are summarized in Brown, *Loyalty and Security* 339-49 (1958); see also MacIver, *Academic Freedom in Our Time* ch. xi (1955).

[13] See *Academic Freedom and Tenure: 1940 Statement of Principles*, 44 AAUP Bulletin 290-92 (1958); *Statement on Procedural Standards in Faculty Dismissal Proceedings*, *id.* at 270-274. Both of the foregoing statements were framed and adopted by the Association of American Colleges and the American Association of University Professors, and the former has been endorsed by seven other academic organizations.

misapprehensions derive largely from a failure to appreciate two facts. First, the overwhelming majority of teachers, like the overwhelming majority of Americans, are loyal and honest. Second, their influence with students has far outweighed that of a handful of conspirators or dupes. In any event, the proper tool for weeding out the unfit and the unfaithful is the established mechanism of the academic community, not the steam roller of the investigating committee.

3. Congress Should Not Be Taken To Have Authorized the House Committee on Un-American Activities To Investigate Education and To Compel Petitioner To Answer the Questions He Refused To Answer. If Such Authorization Was Attempted, It Must Fall As Violative of the First Amendment.

In view of the vagueness of the resolution creating the Committee, it is hard to tell what investigations the House of Representatives authorized it to pursue. *Watkins* v. *United States*, 354 U.S. 178 (1954). A decision that the House did not authorize the investigation that was made by the Committee would be consonant with the common supposition that the Congress would not intend to authorize an investigation that raised such grave constitutional problems.

It must be recognized, on the other hand, that this investigation lasted for more than one session, and that the House may have been mindful of it in renewing the Committee's appropriations. There is also the fact that the House voted, in effect, to prefer contempt charges against petitioner. This brief does not argue the question whether implied authority can be "squeezed out" of such data (see *Watkins*, *supra*, at 217 (concurring opinion)). It does contend that,

if authority is found, it is the duty of this Court to declare the unconstitutionality of the kind of investigation of education and teachers that the Committee made, because of its abridgement of rights guaranteed to the petitioner by the First Amendment.

CONCLUSION

For all of the reasons set out in this brief, it is respectfully submitted that the petitioner could not be compelled to answer the questions that he refused to answer; therefore his conviction must be reversed.

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